No. 90-22

AUG 1 1990

In The

Supreme Court of the United States

October Term, 1989

LEVESTER THOMPSON, M.D.,

Petitioner,

v.

WISE ARH GENERAL HOSPITAL, ST. MARY'S HOSPITAL, INC., NORTON COMMUNITY HOSPITAL AND LONG TERM CARE FACILITY, O. DAVIS BEVINS, RUBY SALYER, SISTER ANNE CHRISTINA SULLIVAN, MARTY PRINCE, M.D., CHARLES FULTON, M.D., ISAM ZEBDAH, M.D., A.W. NORTH, M.D., CHARLES P. MAINE, M.D., AND R. CARTEGENA, M.D.,

Respondents.

BRIEF BY RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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LIST OF PARTIES AND RULE 29.1 LIST

The petitioner in this case is Levester Thompson, M.D. The individual respondents are O. Davis Bevins, Ruby Salyer, Sister Anne Christina Sullivan, Marty Prince, M.D., Charles Fulton, M.D., Isam Zebdah, M.D., A. W. North, M.D., Charles P. Maine, M.D., and R. Cartegena, M.D. The corporate respondents are St. Mary's Hospital, Inc., Norton Community Hospital and Long Term Care Facility, and Wise ARH General Hospital.

St. Mary's Hospital, Inc., is a non-profit, non-stock corporation without any parent company or subsidiaries. Norton Community Hospital and Long Term Care Facility is a non-profit, non-stock corporation that is wholly owned by Norton Community Health Services, Inc., which, in turn, has no parent company or subsidiaries, other than wholly owned subsidiaries. Wise ARH General Hospital is owned by Appalachian Regional Health Care, Inc., a non-profit, non-stock corporation, which has no parent company or subsidiaries.

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OPINION BELOW

The opinion of the United States District Court for the Western District of Virginia is now reported at 707 F. Supp. 849 (W.D. Va. 1989).

STATEMENT OF THE CASE

The Petitioner, Dr. Levester Thompson, is a black physician who formerly practiced medicine in Wise

County, Virginia, and now practices in Emporia, Virginia. The respondents include three Wise County hospitals, their respective hospital administrators, and six local physicians who served on one or more of the hospitals' medical staffs during the period in question. This case arises out of separate decisions by the respondent hospitals to terminate all or part of Thompson's hospital privileges over a two-year period: first St. Mary's terminated all his privileges in November, 1984; then Wise General terminated his obstetrical privileges in January, 1986; and lastly Norton Community terminated his ICU privileges in August, 1986. Each termination occurred after one or more patients under Thompson's care developed serious health complications while at the hospital in question.

Thompson's Petition for the Writ of Certiorari does not adequately set out the protracted procedural history in the trial court below. Ignoring this history, Thompson intimates that the trial court dismissed his claims without affording him an adequate opportunity to plead his case. To correct the misstatements contained in Thompson's Petition and to demonstrate that there is no merit to Thompson's alleged procedural irregularities, respondents are providing this statement of the case.

As the statement of the case will show, during the two years this case was before the trial court, Thompson's three separate attorneys filed three radically different complaints which successively added and dropped parties and causes of action without rhyme or reason. Throughout this convoluted process, the trial court, with remarkable patience, gave Thompson every reasonable opportunity to advance his case beyond the pleading stage. Despite repeated efforts, Thompson was never able

to allege sufficient facts or cognizable claims to avoid dismissal of his case.

(a) Thompson's Original Complaint as Pled by His First Attorney

Thompson's first counsel, Chester Smith, Esq., filed an original complaint on Thompson's behalf against the respondents in December of 1986. The initial complaint was exceedingly vague on the causes of action asserted or the facts in support thereof. (Appendix at 1-15.) In a conclusory fashion, Smith pled that the respondents, acting pursuant to some undefined "conspiracy," had violated Thompson's civil rights by terminating his staff privileges at the three respondent hospitals on the basis of his race. Smith asserted that the termination of Thompson's privileges on racial discrimination grounds violated §§ 1981, 1985(3) and 1986 of the Civil Rights Acts, 42 U.S.C. §§ 1981, 1985(3) and 1986 (1982).

In response, the respondents filed motions for more definite statements because the complaint was devoid of sufficient facts to permit a response. Smith filed a written response and appeared on Thompson's behalf to oppose the motions at a hearing in March of 1987. At the hearing, the trial court granted respondents' motions in part and ordered Thompson to state facts that would clarify the nature of his conspiracy claim, specify what acts gave rise to each respondent's individual liability, and indicate on what factual basis Thompson contended he had a contract with the respondents, the interference with which would allegedly support a § 1981 claim.[1]

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[1] In his Petition, Thompson quotes the trial court's ruling on the respondents' motions for more definite statements. (Pet. at 9 n.1.)

(b) - Thompson's Amended Complaint As Pled by His Second Attorney

Following the March 1987 hearing, Smith filed a motion voluntarily dismissing Thompson's § 1985(3) and § 1986 conspiracy claims. Smith also filed a more definite statement. Before the respondents could respond to Smith's revised pleading, however, Bruce Shine, Esq., filed a notice of appearance as Thompson's additional counsel. Shine moved for leave to file an amended pleading, ignoring the more definite statement that Smith had filed. The trial court granted Shine's motion and thereafter granted Shine a series of extensions for filing the amended complaint.

Not until October of 1987 did Shine file the first amended complaint on Thompson's behalf. Shine's amended complaint added back the § 1985(3) conspiracy claim that Smith had voluntarily dismissed and named only the three hospitals as defendants. Shine also filed a separate motion voluntarily dismissing Thompson's action against the eight doctors and three hospital administrators originally sued, which the trial court granted.

The hospital respondents promptly filed motions to dismiss and answers to Shine's amended complaint. The respondents moved to dismiss the § 1981 and § 1985(3) claims under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. Additionally, respondent St. Mary's Hospital asserted a statute of limitations defense to both causes of action and filed a brief in support of its pleadings.

St. Mary's contended in its brief that the statute of limitations had run on Thompson's civil rights claims

because he did not file his suit within two years after his privileges at the hospital were revoked. Additionally, St. Mary's contended that the amended complaint did not allege sufficient facts to establish a § 1985(3) conspiracy claim. Finally, St. Mary's argued that Thompson had no § 1981 claim because: (1) the "equal benefits" prong of § 1981 required state action, which was not present since St. Mary's was a private institution; and (2) the "contract" prong of § 1981 was not available to Thompson because hospital staff privileges are not contractual in nature.

The other two hospital respondents adopted the arguments in St. Mary's brief in support of their own Rule 12(b)(6) motions to dismiss. These hospitals did not join in St. Mary's statute of limitations defense because that defense was not available to them.

Upon receipt of St. Mary's brief, the trial court ordered Thompson to respond. Shine, Thompson's second attorney, thereupon filed a motion to withdraw. The trial court granted Shine's motion in April of 1988 and directed Thompson to obtain new counsel within thirty days.

(c) Thompson's Second Amended Complaint as Pled by His Third Attorney

In June, 1988, Sa'ad El-Amin, Esq., filed a notice of appearance as Thompson's new counsel. El-Amin also filed a motion to add as additional parties the doctors and hospital administrators that Thompson, through earlier counsel, had voluntarily dismissed. El-Amin further requested leave to amend Thompson's complaint yet

again to allege new causes of action against all respondents. Finally, El-Amin filed a brief in opposition to St. Mary's motions to dismiss and statute of limitations defenses. The trial court granted El-Amin's motions and ordered him to provide enough copies of the second amended complaint to the clerk to permit service on the non-hospital defendants to be added back into the case.

Thompson's second amended complaint, as prepared by El-Amin, consisted of five causes of action. (Appendix at 82-126.) El-Amin set out Thompson's civil rights claims in counts one and four. In count one El-Amin alleged that the respondents conspired to deprive Thompson of his livelihood as a physician by terminating his privileges at the three hospitals because of his race in violation of 42 U.S.C. § 1985(3). In count four El-Amin alleged that the respondents' actions interfered with Thompson's contractual relations in violation of 42 U.S.C. § 1981. Count three contained Thompson's other federal claim – that the respondents' actions violated the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2 (1982). Finally, in counts two and five, El-Amin alleged that the respondents' termination of Thompson's hospital privileges violated various Virginia statutes and common law.

The hospital respondents again filed motions to dismiss and St. Mary's renewed its statute of limitations defense. The three hospitals additionally raised statute of limitations defenses to the state law claim in count two. All three hospitals moved to dismiss the antitrust count for failure to state a claim.

(d) Withdrawal of Thompson's Third, and Last, Attorney; Dismissal of the Non-Hospital Respondents

Contemporaneously with the hospitals' filing of their responses, El-Amin filed a motion to withdraw as counsel, which the trial court granted in August, 1988. The court directed that the second amended complaint not be served on the non-hospital respondents that El-Amin had sought to reinstate as parties – but had not yet served – until such time as Thompson obtained new counsel, who would agree to assume responsibility for the allegations stated in the second amended complaint.[2] The trial court granted Thompson thirty days to obtain new counsel. In September, 1988, after Thompson's time to obtain new counsel had run, the trial court gave him an additional thirty days to effect service on the non-hospital respondents. The trial court also set a hearing on the pending defense motions for October 7, 1988.

At the October 7 hearing, the parties presented oral argument on respondent hospitals' motions to dismiss, with Thompson representing himself.[3] The trial court

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[2] Thompson's first counsel, Chester Smith, had remained in the case until this time although he had not signed the second amended complaint or otherwise assumed responsibility for it. With El-Amin's withdrawal as counsel, Smith likewise sought leave to withdraw, which the trial court permitted in August 1988.

[3] In his Petition, Thompson alleges that on the morning of the October 7 hearing, the trial court refused to grant an extension requested by Thompson's "would-be new law firm" during a long distance phone call. (Pet. at 10-11.) Actually, the trial court correctly refused to postpone the hearing, which had been properly noticed, because of the last-minute nature of the

(Continued on following page)

directed the parties to present any written argument they chose within fifteen days after the hearing.

Counsel for hospital respondents and Thompson, acting *pro se*, filed additional written argument within this time frame. Thompson also improperly filed certain "in camera" material for the trial court to consider in ruling on the motions to dismiss. This material was never disclosed to respondents' counsel, until it appeared in Thompson's Petition to this Court. (Appendix at 16-72.)

On October 26, 1988, the trial court entered an order dismissing Thompson's action against the non-hospital respondents because Thompson failed to effect service within the thirty days ordered by the court. The dismissal order was designated as final pursuant to Federal Rule of Civil Procedure 54(c). Thompson then filed a "Memorandum In Opposition" within fifteen days thereafter, which the court ultimately treated as a motion to vacate. In late October and early November, in direct contravention of the court's October 26 ruling, Thompson effectuated service on the non-hospital respondents. This service was promptly challenged by motions to quash. On November 16, 1988, the trial court entered another order as to the non-hospital respondents quashing service, denying

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(Continued from previous page)

extension request and because the new law firm was not making an appearance on Thompson's behalf; it was asking only for additional time to consider the possibility of representing Thompson. The law firm, which would have been the fourth to appear in the case as Thompson's counsel, apparently elected not to represent Thompson as it subsequently made no formal appearance.

Thompson's motion to vacate, and dismissing Thompson's action against them. This order was likewise designated final pursuant to Rule 54(c).

On November 28, 1988, Thompson filed yet more papers arguing against dismissal of the non-hospital respondents. The trial court treated Thompson's filing as an additional motion to vacate the judgement and denied it by a third Rule 54(c) order entered on November 30, 1988. Thompson did not appeal this order to the Fourth Circuit Court of Appeals within thirty days thereafter as required by law.

(e) Dismissal of the Hospital Respondents

On February 23, 1989, the trial court entered an order dismissing Thompson's action against the hospital respondents for the reasons set out in the court's accompanying opinion. *Thompson v. Wise General Hospital*, 707 F. Supp. 849 (W.D. Va. 1989), *aff'd*, No. 89-2055 (4th Cir. Jan. 30, 1990). Essentially, the trial court dismissed the § 1985(3) claim because Thompson failed to allege sufficient facts of conspiracy. The court observed that the conspiracy allegations were conclusory in nature and were devoid of any material facts to suggest the requisite meeting of the minds.[4]

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[4] The trial court described the absence of sufficient facts to support a conspiracy claim in the amended complaint as follows:

> Assuming that everything happened exactly the way the complaint alleges that it did, the most that it has

(Continued on following page)

The trial court likewise dismissed the § 1981 claim because the private nature of the hospital respondents precluded that claim under § 1981's "equal benefits" prong, and Thompson had no contractual right to hospital privileges to support a claim under § 1981's "contract" prong. *Id.* at 852-53. The trial court also dismissed the antitrust claim because Thompson had failed to allege sufficient facts to show how the respondents' alleged conduct affected interstate commerce, a jurisdictional prerequisite. *Id.* at 854-56. Finally, the trial court dismissed the two state law counts for lack of pendent jurisdiction. *Id.* at 856.

(Continued from previous page)

shown is that each hospital, apparently acting independently, terminated Dr. Thompson's privileges for problems that were someone else's fault. Notably, the termination by Wise General came 14 1/2 months after the termination by St. Mary's, and Norton Community terminated Dr. Thompson's ICU privileges more than six months after that, or nearly two years after St. Mary's. A hospital, being an inanimate entity, cannot itself conspire with anyone or anything; some human agency must be involved. There is no indication in the complaint of who, when, how, or where any doctors, administrators, or other individuals connected with any of the defendants conspired to deprive Dr. Thompson of any rights or privileges. And the timetable of the terminations, spread out over two years, is hardly silent evidence of a conspiracy.

Thompson v. Wise Gen. Hosp., 707 F. Supp. at 852.

(f) Thompson's Appeal to the Fourth Circuit as to the Hospital Respondents

Thompson, acting *pro se*, filed a timely notice of appeal of the February 23, 1989, order dismissing the hospital respondents. The Fourth Circuit, thereafter, pursuant to Local Rule 34(b), directed the parties to file informal briefs because of Thompson's *pro se* status. Subsequent to the filing of briefs, hospital respondents' counsel presented to the Fourth Circuit additional argument for dismissing Thompson's § 1981 claim based on the recently decided case of *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989).

By unpublished opinion, the Fourth Circuit, on January 30, 1990, affirmed the trial court's dismissal of Thompson's civil rights, antitrust and state law claims for the reasons articulated in the trial court's written opinion. The Fourth Circuit additionally held that *Patterson* also foreclosed Thompson's § 1981 claim. Finally, the Fourth Circuit noted that Thompson's appeal was not timely as to the non-hospital respondents, who had been dismissed by the earlier Rule 54(c) order. Thompson had not thereafter filed an appeal of that dismissal order within the requisite 30-day period. (Appendix at 156-59.) Thompson then moved for a rehearing in the Fourth Circuit, which was denied on March 13, 1990.

(g) Thompson's Petition for a Writ of Certiorari

Thompson filed a Petition for a Writ of Certiorari with this Court on April 27, 1990, without providing notice or a copy of the Petition to any of respondents' counsel. The Clerk of this Court subsequently rejected

that Petition as not being in compliance with this Court's rules. Thompson then filed a second Petition in early July of 1990, copies of which were first received by one of respondents' counsel on July 5, 1990.

In his Petition, Thompson assigns error only to matters dealing with his civil rights claims under § 1981 and § 1985(3). He does not assign error or otherwise address the merits of the dismissal of his antitrust claim or the Fourth Circuit's ruling that his appeal was untimely as to the non-hospital respondents.[5]

SUMMARY OF REASONS FOR DENYING THE WRIT

The courts below fully considered and correctly decided the issues which Thompson raises in his Petition. First, the courts correctly held that Thompson did not have a cognizable claim under 42 U.S.C. § 1981 against the respondents for terminating his hospital privileges at the three hospitals in question. Section 1981 requires state action for recovery under the "equal benefits" clause, which was absent in this case. Additionally, hospital privileges do not confer contractual rights so as to support a claim under the "contract" clause of § 1981. Finally, even

[5] Thompson's failure to assign error to the rulings below on the antitrust issue and the untimeliness of his appeal as to the non-hospital respondents represents a waiver on his part to seek review in this Court. *See Phillips Co. v. Dumas Indep. School Dist.*, 361 U.S. 376, 386 (1960); Sup. Ct. R. 14.1(a). The respondents accordingly will not address the merits of these decisions in this brief other than to endorse the lower courts' reasons for ruling against Thompson.

if hospital privileges were to confer contractual rights, this Court's recent decision in *Patterson v. McLean Credit Corporation*, 109 S. Ct. 2363 (1989), precludes recovery under § 1981 because the conduct in question postdated alleged contract formation.

Second, the courts below correctly decided that Thompson failed to state a claim of conspiracy under 42 U.S.C. § 1985(3). Despite three attempts through three separate attorneys, Thompson never provided any facts to show that any of the respondents conspired to harm him because of his race. The case law followed by the courts below correctly holds that a sufficient § 1985(3) claim must go beyond pure conclusory allegations to state the factual basis of the claim, which is totally lacking in Thompson's pleadings.

Third, the trial court provided Thompson every opportunity to present his claim and did not commit the numerous procedural errors Thompson vaguely alleges in his Petition.

Fourth, although the courts below did not reach the issue, the statute of limitations plea of two of the respondents, St. Mary's and Sister Anne Christina Sullivan, bars Thompson's § 1981 and § 1985(3) claims against them. Thompson did not file his action against these respondents within two years after St. Mary's terminated his privileges, which is when his cause of action would have accrued. Thompson's effort to avoid the statute of limitations with his "continuing violation" tolling argument is unsupported by the applicable case law. This case law recognizes that the statute of limitations begins to run

upon termination of the professional or employment relationship and is not thereafter tolled by subsequent efforts by the plaintiff to obtain a reversal of that termination.

REASONS FOR DENYING THE WRIT

(a) The Central Issue in This Case Was Correctly Decided Below: Thompson Does Not Have a Cognizable § 1981 Claim Against the Respondents for Terminating His Hospital Privileges.

In the second and fourth "Questions Presented," and in his second argument, Thompson sets forth his central claim that respondents unlawfully interfered with his contractual rights in violation of 42 U.S.C. § 1981 when they separately terminated his hospital privileges. He contends the trial court erred in dismissing count four of his second amended complaint, which sets out the § 1981 claim. (Appendix at 120-21.) As the courts below correctly held, however, § 1981 does not afford Thompson a cause of action under the facts alleged.

Section 1981 protects the rights of racial minorities "to make and enforce contracts" and to enjoy the "equal benefits" of law. The statute thus contains two separate prongs which will support a § 1981 claim. The courts below correctly recognized that neither prong was available to Thompson.

Thompson had no claim under the "equal benefits" clause because recovery under this clause requires proof of state action. As the Third Circuit has correctly stated:

> The words "full and equal benefit of all laws and proceedings for the security of persons and

> property" . . . suggest a concern with the relations between the individual and the state, not between two individuals. The state, not the individual, is a sole source of law, and it is only the state acting through its agents, not the private individual, which is capable of denying to blacks the full and equal benefit of the law. Thus, . . . the concept of state action is implicit in the equal benefit clause.

Mahone v. Waddle, 564 F.2d 1018, 1029 (3rd Cir. 1977), *cert. denied*, 438 U.S. 904 (1978).

The Fourth Circuit approved the state action requirement recognized in *Mahone* in *Eggleston v. Prince Edward Volunteer Rescue Squad, Inc.*, 569 F. Supp. 1344 (E.D. Va. 1983), *aff'd*, 742 F.2d 1448 (4th Cir. 1984), and *Shaare Tefila Congregation v. Cobb*, 785 F.2d 523 (4th Cir. 1986), *rev'd on other grounds*, 481 U.S. 615 (1987). In *Eggleston*, the Fourth Circuit affirmed the district court's holding that a black plaintiff had no § 1981 "equal benefits" claim against a volunteer rescue squad that had dismissed him, because no state action was involved. In *Shaare*, the Fourth Circuit affirmed the granting of a motion dismissing plaintiff's § 1981 "equal benefits" claim, finding, *inter alia*, that there was no state action in the private defendants' desecration of a Jewish synagogue.

Each of the respondent hospitals is a private hospital. As such, each hospital's decision concerning staff privileges did not constitute the requisite state action to support recovery under the civil rights laws. *See Carter v. Norfolk Community Hospital Ass'n*, 761 F.2d 970 (4th Cir. 1985); *Modaber v. Culpepper Memorial Hospital, Inc.*, 674

F.2d 1023 (4th Cir. 1982). Consequently, Thompson possessed no cognizable § 1981 claim under the "equal benefits" prong.

Similarly, Thompson failed to establish a claim under the "contract" prong of § 1981, even though this clause does not require state action. This clause, as the statutory language reveals, requires only interference with contract rights. The hospital privileges Thompson lost, however, were not contractual in nature. Hospital privileges confer associational status only and not a contractual right that can be enforced in the courts. *Guibor v. Manhattan Eye, Ear & Throat Hospital*, 413 N.Y.S.2d 638, 639, 386 N.E.2d 247 (N.Y. 1978) (At common law "denial of staff privileges for whatever reason, or for no reason at all, constituted no legal wrong.") *See also Manczur v. Southside Hospital*, 183 N.Y.S.2d 960 (N.Y. Sup. Ct. 1959); *Loewinthan v. Beth David Hospital*, 9 N.Y.S.2d 367 (N.Y. Sup. Ct. 1938); *Weary v. Baylor University Hospital*, 360 S.W.2d 895 (Tex. Ct. App. 1962); *Hodges v. Arlington Neuropsychiatric Center, Inc.*, 628 S.W.2d 536 (Tex. Ct. App. 1982); *Grossling v. Ford Memorial Hospital*, 614 F. Supp. 1051 (E.D. Tex. 1985); *Wood v. Hilton Head Hospital, Inc.*, 292 S.C. 403, 356 S.E.2d 841 (1987). *Cf. Khoury v. Community Memorial Hospital, Inc.*, 203 Va. 236, 245, 123 S.E.2d 533, 539 (1962) (Doctor has no constitutional right to be granted privileges which a private hospital must honor.). The Fourth Circuit has similarly held that an organization's grant of associational status – as occurs with hospital privileges – does not confer contractual rights which are protected by § 1981. *Eggleston v. Prince Edward Volunteer Rescue Squad*, 569 F. Supp. 1344 (E.D. Va. 1983), *aff'd*, 742 F.2d 1448 (4th Cir. 1984) (termination of membership status in rescue squad).

An examination of Thompson's relationship with the hospital respondents demonstrates that it was not contractual in nature. Thompson paid no fee to enjoy privileges and the hospitals received no direct pecuniary consideration in return. Furthermore, Thompson could have unilaterally surrendered his privileges and the hospitals would have had no contractual claim against him. Thus, there was no consideration or mutuality of obligation to support a contract. As the common law recognizes, the essential components of an enforceable contract simply do not exist in the context of hospital privileges. Thompson's § 1981 claim under the "contract" prong must accordingly fail.

But even if hospital privileges under Virginia law conferred contractual rights to Thompson, he would still have no § 1981 claim. This Court recently held that § 1981 only reaches racial discrimination which interferes with the formation or enforcement of contracts, and not alleged discriminatory treatment which occurs *after* contract formation:

> [T]he right to make contracts does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established, *including breach of the terms of the contract* or imposition of discriminatory working conditions. *Such post-formation conduct does not involve the right to make a contract, but rather implicates the performance of established contract obligations and the conditions of continuing employment, matters more naturally governed by state contract law and Title VII.*

Patterson v. McLean Credit Corporation, 109 S. Ct. 2363, 2373 (1989) (emphasis added).

The Fourth Circuit, in its decision below, held Thompson's claim of discriminatory termination of his hospital privileges, which involved conduct after alleged "contract" formation, was barred under *Patterson*. (Appendix at 158.) The better reasoned federal cases have similarly interpreted *Patterson* to bar a § 1981 claim for termination of contract rights. These courts have held that plaintiffs in such contexts are limited to state law and Title VII remedies. *See McKnight v. General Motors Corp.*, Nos. 89-1379 and 89-1526 (7th Cir. July 2, 1990) (1990 WL 89739); *Courtney v. Canyon Television & Appliance Rental, Inc.*, 899 F.2d 845 (9th Cir. 1990); *Lavender v. V & B Transmissions & Auto Repair*, 897 F.2d 805 (5th Cir. 1990); *Carroll v. General Accident Insurance Co.*, 891 F.2d 1174 (5th Cir. 1990); *Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527 (11th Cir. 1990); *Singleton v. Kellogg Co.*, No. 89-1073 (6th Cir. Nov. 29, 1989) (1989 Lexis 17920); *Joseph v. Zachary Manor Nursing Home*, 729 F. Supp. 41 (M.D. La. 1990); *Williams v. BLM Co.*, 731 F. Supp. 231 (N.D. Miss. 1990); *Johnson v. United States Elevator Corp.*, 723 F. Supp. 1344 (E.D. Mo. 1989); *Rivera v. AT&T Information Systems, Inc.*, 719 F. Supp. 962 (D. Colo. 1989); *Greggs v. Hillman Distributing Co.*, 719 F. Supp. 552 (S.D. Tex. 1989). Under the construction of § 1981 promulgated in *Patterson*, Thompson has no § 1981 claim for termination of his hospital privileges.

In summary, because the respondent hospitals are not state actors so as to trigger the "equal benefits" clause of § 1981 and Thompson had no contractual relationship with the hospitals, he has no enforceable civil rights action under § 1981. Moreover, even assuming that hospital privileges do confer contractual rights, *Patterson* and

its progeny demonstrate that Thompson would still lack a § 1981 remedy. For these reasons this Court should not grant Thompson's Petition for a writ of certiorari on this issue.

(b) The Courts Below Correctly Held Thompson Had Not Sufficiently Stated a Conspiracy Claim to Survive Respondents' Motions to Dismiss.

In his second "Questions Presented," and his first argument, Thompson assigns error to the dismissal of his conspiracy claim as set out in Count I of his second amended complaint. In that count, Thompson alleged in conclusory language that the respondents conspired to deprive him of his livelihood in violation of 42 U.S.C. § 1985(3). (Appendix at 115-116.) Nowhere, however, did Thompson in that complaint (or in his two earlier complaints) allege conspiracy "with sufficient specificity and factual support to suggest a 'meeting of the minds' " by the alleged conspirators. *Deck v. Leftridge*, 771 F.2d 1168, 1170 (8th Cir. 1985). Mere conclusory allegations of conspiracy, as contained in Thompson's various complaints, will not survive a motion to dismiss. *See Arsenaux v. Roberts*, 726 F.2d 1022 (5th Cir. 1982) (citing *Slotnick v. Staviskey*, 560 F.2d 31, 33 (1st Cir. 1977), *cert. denied*, 434 U.S. 1077 (1978)); *Briscoe v. Lahue*, 663 F.2d 713, 723 (7th Cir. 1981), *aff'd*, 460 U.S. 325 (1983); *Pillette v. Detroit Police Department*, 661 F. Supp. 1145 (E.D. Mich. 1987), *aff'd*, 852 F.2d 1288 (6th Cir. 1988); *Mosher v. Saalfeld*, 589 F.2d 438 (9th Cir. 1978), *cert. denied*, 442 U.S. 941 (1979); *Croatan Books, Inc. v. Commonwealth of Virginia*, 574 F. Supp. 880 (E.D. Va. 1983); *Davis v. Sprouse*, 405 F. Supp. 45, 46-47 (E.D. Va. 1975).

The courts below correctly held that Thompson's factual allegations do no more than show successive independent action by the three hospital respondents to terminate Thompson's privileges over a twenty-month period. Each termination occurred only after certain patients developed serious health complications while in Thompson's care. St. Mary's Hospital first terminated Thompson's privileges in November of 1984 without any alleged consultation by its employees or agents with any of the employees or agents of the other two hospital respondents. Wise General Hospital subsequently terminated Thompson's obstetrical privileges over a year later in January of 1986. Norton Community Hospital finally terminated Thompson's ICU privileges in August of 1986.

Thompson, through his former counsel, conceded in the trial court that each hospital could not conspire with its own medical staff because of the general rule that a corporation and its agents constitute a single legal entity. *See Marmott v. Maryland Lumber Co.*, 807 F.2d 1180 (4th Cir. 1986), *cert. denied*, 482 U.S. 929 (1987); *Buschi v. Kirven*, 775 F.2d 1240 (4th Cir. 1985); *Bowman v. State Bank of Keysville*, 229 Va. 534, 331 S.E.2d 797 (1985). Thompson nowhere alleged facts in any of his complaints to suggest conspiratorial consultation among or between agents or employees of the three hospitals prior to any decision on his privileges. Thus, the facts to support the requisite "meeting of the minds" for a § 1985(3) claim are simply nowhere pled.

Thompson was afforded three attempts in the trial court to plead an adequate conspiracy claim. Yet each time his counsel alleged conspiracy in conclusory terms

without any factual support. Absent such factual allegations, the courts below properly ruled that Thompson had failed to state an adequate § 1985(3) claim. This Court accordingly should refuse Thompson a writ as to this issue.

(c) The Courts Below Committed No Procedural Errors to Justify this Court Granting a Writ.

Thompson assigns several errors of a procedural nature in his first and sixth through ninth "Questions Presented." These questions are largely unintelligible and there are no corresponding arguments in the Petition to explain their meaning. Under Supreme Court Rule 14, Thompson's failure to state his questions and arguments clearly is itself a sufficient ground for this Court to deny his Petition. To the extent it is possible to discern what Thompson is complaining about as to the procedural issues he raises, a brief reference to the procedural history in the case will show there is absolutely no merit to them.

First, in question one Thompson apparently criticizes the trial court for refusing to entertain the "in camera" material he filed by letter to the court in October of 1988. Thompson never provided this material to respondents' counsel until he included it in his Petition to this Court. The material appears to be a consultant's report sent to Dr. Thompson's counsel. The consultant apparently reviewed from a malpractice perspective the five cases that had resulted in the hospital respondents terminating Dr. Thompson's privileges. After his last counsel withdrew from the case, Thompson submitted this material to

the trial court in response to hospital respondents' pending Rule 12(b)(6) motions to dismiss.

The trial court certainly was correct in not considering this material in deciding the merits of the 12(b)(6) motions. Not only was the material improperly submitted, it was irrelevant to the trial court's ruling on the motions to dismiss. These motions did not require the trial court to consider the issue of Dr. Thompson's malpractice; the motions raised legal objections to the sufficiency of his pleading on other issues entirely, as the prior sections of this brief demonstrate. Thus, Thompson's assignment of error on this point is without merit.

Similarly, Dr. Thompson has not identified a meritorious error in his sixth "Question Presented." The question is largely unintelligible but respondents assume the question represents criticism of the trial court for not permitting Thompson to proceed to trial on the merits of his claims. Thompson fails to recognize that his right to trial arose only after he had stated a sufficient cause of action in his pleadings. In granting the respondents' 12(b)(6) motions, the trial court obviously concluded that Thompson had not, despite three efforts, sufficiently pled a claim upon which relief could be granted. Since the trial court found the 12(b)(6) motions to have merit, it had no discretion but to dismiss Thompson's complaint. Thus, there is obviously no error to support a writ on this issue.

Thompson's question seven is likewise obscure and unenlightening. It is difficult to discern what Thompson means by his allegation that the trial court ignored his counsel and issued orders directly to him. The only

orders the trial court issued directing Thompson to do anything, as opposed to his counsel, occurred after his last counsel had withdrawn from the case in August of 1988, and Thompson thereafter elected to proceed *pro se*. Orders subsequent to that time by necessity treated Thompson as his own counsel. Accordingly, Thompson's petition for a writ on this point is absurd.

In question eight, Thompson accuses the trial court of making improper use of sanctions under Federal Rule of Civil Procedure 11. The trial court, however, never imposed any sanctions against Thompson or his attorneys. It did refer to Rule 11 in its August 8, 1988, order permitting Thompson's third attorney to withdraw. The order directed the Clerk not to issue service on the non-hospital respondents, who Thompson's third counsel had named as additional parties but had not served, until Thompson had procured new counsel who would accept responsibility for the pleadings pursuant to Rule 11. There was nothing improper about this reference, particularly given the convoluted procedural history which preceded the court's order. Therefore, the trial court took no improper action which would support a writ.

In question nine, Thompson appears to assign error to the trial court's decision in November, 1988, granting the non-hospital respondents' motions to quash service and dismissing them from the lawsuit. As the statement of the case reveals, Thompson did not file a timely appeal of the trial court's November dismissal order and thus he has waived any right to obtain a writ on this point. Nevertheless, the respondents' statement of the case correctly sets out the protracted procedural history which predated the court's dismissal order and graphically

demonstrates the wisdom of the trial court's action. The non-hospital respondents had been originally sued by one attorney, voluntarily dismissed by a second, and added back by a third, who thereafter immediately withdrew from the case. Even then, the trial court provided Thompson thirty days to obtain new counsel to effectuate service on the non-hospital respondents, and, when Thompson failed to meet this deadline, gave him an additional thirty days to effectuate service himself. Thompson made no effort to comply with the time limit set out in either order. Therefore, the trial court acted properly in thereafter ordering Thompson's actions against the non-hospital respondents dismissed. There is no basis to grant Thompson a writ on this issue.

(d) Thompson's Failure to File His § 1981 and § 1985(3) Claims Against Respondent St. Mary's Hospital and Its Administrator, Respondent Sister Anne Christina Sullivan, Within Two Years After the Termination of His Privileges Bars His Action as to These Respondents.

In his fifth "Question Presented" Thompson improperly assigns error on an issue that the courts below did not reach – whether the applicable statute of limitations had run on his § 1981 and § 1985(3) claims against St. Mary's Hospital and Sister Anne Christina Sullivan, its administrator. While the courts below did not decide this limitations defense, it provides an additional reason for denying Thompson a writ as to these respondents.

Thompson's own pleadings reveal that his privileges at St. Mary's Hospital were terminated on November 16,

1984. (Appendix at 89, ¶ 21 & 22.) Sister Anne, the Hospital's administrator at the time, in an undisputed affidavit filed with the trial court affirmed that after November 16 Thompson had no further professional relationship with the Hospital. Thompson could have filed a lawsuit relative to termination of his privileges any time after November 16. Yet he did not file his initial complaint until December 23, 1986, over two years later.

This Court has held that, because § 1981 lacks its own limitation period, the forum state's statute governing personal injury claims applies. *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987). In Virginia, the applicable personal injury statute requires suit to be filed "within two years after the cause of action shall have accrued." Va. Code Ann. § 8.01-243(A) (1984).

The federal courts in Virginia have likewise held that conspiracy claims under § 1985 are governed by the same two-year limitations period. *See Brady v. Sowers*, 453 F. Supp. 52 (W.D. Va. 1978); *Harris v. Obenshain*, 452 F. Supp. 1172 (E.D. Va. 1978); *Wilkenson v. Hamel*, 381 F. Supp. 768 (W.D. Va. 1974); *Sitwell v. Burnette*, 349 F. Supp. 83 (W.D. Va. 1972). Under this case law, Thompson's claims under § 1981 and 1985(3) were clearly time-barred when suit was filed over two years after he lost his privileges.

Thompson, however, asserts in his Petition that his civil rights claims are not barred because St. Mary's engaged in a "continuing violation" by failing to afford him a post-termination hearing. Thompson's argument is plainly wrong. He ignores the fact that the substance of his civil rights claims was for damages arising out of loss of his privileges. That act was complete in November of

1984 and at that moment he had a mature right to sue. Any alleged refusal on St. Mary's part thereafter to reconsider its decision does not amount to a "continuing violation" so as to toll the statute of limitations.

The cases Thompson cites at pages 26-28 of his Petition to support his "continuing violation" argument are inapplicable. Contrary to his contention, the Fourth Circuit's decision in *Williams v. Norfolk & Western Railway Co.*, 530 F.2d 539 (4th Cir. 1975), actually supports St. Mary's argument. In that case the Fourth Circuit held that an employee who had retired more than two years before filing his § 1981 claim could not bring that claim as a continuing violation. The court did hold that certain of the retired employee's other claims, not applicable here, had not accrued at the time of his retirement.

Similarly, the other cases Thompson cites in his Petition involve allegations of discrimination in an ongoing employment context. None of the cases apply the "continuing violation" rule to a situation where, as here, the professional relationship had been completely severed. *See, e.g., Cox v. United States Gypsum Co.*, 409 F.2d 289 (7th Cir. 1969) (continuing violation where laid-off workers would have enjoyed prospect of reemployment but for alleged discrimination in subsequent recall decisions).

The applicable case law demonstrates that a plaintiff who has been terminated from a professional or employment relationship cannot avoid the statute of limitations by alleging that a later refusal to reconsider that decision amounts to a "continuing violation" of plaintiff's rights. For instance, in *De Leon Otero v. Rubero*, 820 F.2d 18 (1st Cir. 1987), the First Circuit held that an employer's

refusal to reinstate a demoted employee, after the employee's successful appeal to a personnel administration board, did not convert the initial demotion into a continuing violation of the employee's civil rights.

Similarly, the Fifth Circuit has observed that discharge from employment, as opposed to temporary layoff, cannot give rise to a continuing violation "because the individual ceases to be an employee on the date of his discharge and all of his legal claims mature at that time." *Taylor v. Bunge Corp.*, 775 F.2d 617, 619 (5th Cir. 1985).

Finally, the Fourth Circuit has held that the statute of limitations begins to run on an alleged claim of conspiracy to deny collective bargaining rights at the time of initial discharge and not at any later date when the employer refuses to reinstate the employee. *West v. ITT Continental Baking Co.*, 683 F.2d 845 (4th Cir. 1982). The Fourth Circuit's reasoning is directly applicable to the instant case:

> The change in employment status was the significant event of which [plaintiff] complained. After his discharge from employee status, all of the wrongs alleged relate solely to that event and ITT's refusal to change its decision. Thus the continuing violation doctrine does not apply . . . . Under [plaintiff's] suggested application of the continuing violation doctrine, he could keep his claim of wrongful discharge forever alive by requesting once every three years that ITT reinstate him. This, of course, would destroy the policies of finality and repose underlying the statute of limitations.

Id. at 846 (citations omitted).

As in the cases cited above, Thompson's civil rights allegations against St. Mary's pertain to his termination of privileges in November, 1984. The Hospital's alleged refusal to reconsider that decision cannot convert that discrete act of termination into an ongoing violation. Otherwise, as the Fourth Circuit acknowledged in *West*, Thompson could continually revive his civil rights claims by merely renewing a request for a post-termination reconsideration every two years.

For these reasons, Thompson's § 1981 and § 1985(3) claims as to respondents St. Mary's and Sister Anne Christina Sullivan are time-barred and no writ relative to these claims and these respondents should be granted.

CONCLUSION

The courts below correctly decided the principal issues in this case and the respondents, therefore, urge that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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